

**MARICOPA COUNTY SUPERIOR COURT
FAMILY LAW DEPARTMENT**

Family Law Appellate Case Law Summary

June 7, 2004 To May 18, 2005

I. Family Law Procedure

- A. Service By Publication—Personal Jurisdiction. “We hold that a plaintiff pursuing a money judgment against a defendant whose residence is unknown but whose last known residence was within the state, or who has avoided service, can be served by publication in accordance with the requirements of Rule 4.1(n) of the Arizona Rules of Civil Procedure. *Master Financial, Inc. v. Woodburn*, 427 Ariz. Adv. Rep. 36, 208 Ariz. 70, 90 P.3d 1236 (CA 1, 6/7/04) (Publication is sufficient “when a plaintiff has exercised due diligence to personally serve a resident defendant at a last known address within the state and has complied with the publication procedures of Rule 4.1(n).”)
- B. Post-Decree Bankruptcy Basis To Set Aside Decree Per ARCP 60(c)(6). Husband’s filing of a Chapter 7 Bankruptcy approximately 2 months after the entry of the parties Decree of Dissolution resulting in Wife being obligated to pay all community debt and remaining liable for property equalization payments to Husband, created “such a substantial injustice that it overrides the commitment to finality of judgments and on the facts of this case calls for relief under Rule 60(c)(6).” On remand the trial court should determine: 1) Whether to affirm an award of attorney’s fees and clarify whether it is in the nature of nondischargeable maintenance or support rather than part of a property division; 2) Whether the bankruptcy discharge resulting in the doubling of Wife’s ultimate liability on community debts requires an award of spousal maintenance to Wife; 3) Whether the discharged creditors have reached any agreements with Wife to limit the Wife’s obligation on the debts; 4) Whether to reallocate property, debts or equalization payments; and 5) Whether the original allocations were in the nature of spousal maintenance or child support rather than a simple division of property and debt. *Birt v. Birt*, 208 Ariz. 546, 96 P.3d 544 (CA1, 8/12/04) (“We do not imply or hold that a later bankruptcy by a party to a divorce requires or necessarily supports Rule 60(c)(6) relief. Each case must be determined on its own facts.”)
- C. Closing Argument Can Be Limited. “There is no constitutional or statutory provision that guarantees parties in a civil bench trial the right to present closing argument.” *Fuentes v. Fuentes*, 435 Ariz. Adv. Rep. 61, 209 Ariz. 51, 97 P.3d 876 (CA1, 9/28/04).

II. Marriage

- A. Valid Out-of State Marriage Not Void If Also Valid When Parties Residents of Arizona. The 1984 marriage of first cousins validly performed in the state of Virginia was not void in Arizona under A.R.S. §25-101, where the parties moved to Arizona in 1989 before the 1996 amendment to A.R.S. §25-112 declaring the marriage void. A statutory amendment cannot retroactively disturb the **vested substantial right** of marriage. *Cook v. Cook*, 444 Ariz. Adv. Rep. 23, 209 Ariz. 487, 104 P.3d 857 (CA1, 1/13/05). (“Accordingly, in the context of a claim of a ‘void’ marriage under A.R.S. §25-112(A), we hold that one’s right to have an out-of-state marriage deemed valid in the state of Arizona vests upon the following conditions: (1) the marriage was valid in the state where contracted; (2) the parties to the marriage were residents of Arizona prior to the enactment of the

amendment to §25-112(A) on July 20, 1996; and (3) that during this period of residency in Arizona their marriage was validly recognized under the statutory scheme then in place in Arizona.”)

III. Custody / Parenting Time

- A. In Loco Parentis Step-mother Can Be Awarded Visitation Rights With Custodial Mother. A.R.S. §25-415(C) authorizes the court to award reasonable in loco parentis visitation rights to a widowed step-mother “when the stepchild enjoyed good relationships with both legal parents before the father’s death and the child is currently parented by his legal mother.” *Riepe v. Riepe*, 429 Ariz. Adv. Rep. 30, 208 Ariz. 90, 91 P.3d 312 (CA 1, 6/29/04) (In loco parentis relationship must be present per A.R.S. §25-415(G)(1), the visitation must be in the child’s best interests, and the remaining factors of A.R.S. §25-415(C) must be satisfied).

IV. Child Support

- A. Statute of Limitations Inapplicable To Administrative Remedies. If unpaid child support judgments have not been reduced to a written judgment within three years of the emancipation of the child in question, the statute of limitations set forth in A.R.S. §25-503(I) may prohibit the collection of a *judgment* through the courts, but the State can still pursue statutory administrative remedies to collect the *debt* until the debt is paid. *Department of Economic Security v. Hayden*, 427 Ariz. Adv. Rep. 3, 208 Ariz. 164, 91 P.3d 1007 (CA 1, 6/8/04) (“There is a legal distinction between the terms ‘judgment’ and ‘debt’.”)
- B. No Credit For Prior Arrearage or Future Credit For Social Security Disability Benefits. During the period of Father’s disability when the child was entitled to receive Social Security Disability Benefits, the court should apply all payments received against Father’s child support obligation for the period. He must pay any arrearage for the period, but Father “is not entitled to a credit against arrearage accumulated prior to disability” if the payments exceed the amount due. Nor is he entitled “to any refund for any alleged overpayment” pursuant to Section 25 of the Guidelines. *Clay v. Clay*, 428 Ariz. Adv. Rep. 32, 208 Ariz. 200, 92 P.3d 426 (CA 1, 6/24/04).
- C. Child Support & Spousal Maintenance Can Exceed 50% of Disposable Income. A.R.S. §33-1131(C) “limits only the amount of *earnings* that can be subject to *assignment* [to 50% of disposable earnings, but] the statute does not limit the amount of child support and/or spousal maintenance that can be ordered by a trial court.” *Fuentes v. Fuentes*, 435 Ariz. Adv. Rep. 61, 209 Ariz. 51, 97 P.3d 876 (CA1, 9/28/04).
- D. Fault Cannot Be Considered In Determining Child Support. Court cannot consider Father’s “deceitful” behavior in having an extramarital affair in determining a child support obligation under A.R.S. §25-320(A). *Fuentes v. Fuentes*, 435 Ariz. Adv. Rep. 61, 209 Ariz. 51, 97 P.3d 876 (CA1, 9/28/04).
- E. Application of Support Payments Before & After December 1, 1998. Child support payments “must be calculated pursuant to the law” in effect when the payments were made. Support “payments made before December 1998 must be applied to interest arrearage first and to principal arrearage second” pursuant to the “United States Rule” then in effect. Payments “made after November 30, 1998 [when A.R.S. §25-510(A)(4) became effective], are applied to principal arrearage first and to interest arrearage second.” *Alley v. Stevens*, 443 Ariz. Adv. Rep. 19, 209 Ariz. 426, 104 P.3d 157 (CA1, 1/11/05).

- F. Subject Matter Jurisdiction To Modify Support Lost When Everyone Leaves State. Pursuant to A.R.S. §25-626, when all case participants permanently relocate outside of Arizona, the superior court loses subject matter jurisdiction to modify, but may continue to enforce, an Arizona child support order entered when the parties resided here. This interpretation applies even if no action to modify the child support order has been filed in the court of another state that has jurisdiction. However, subject matter jurisdiction remains with the Arizona courts to enforce the order. *McHale v. McHale*, 447 Ariz. Adv. Rep. 3, ___ Ariz. ___, 109 P.3d 89 (CA1, 3/8/05).

V. Spousal Maintenance

VI. Property

- A. A.R.S. §25-318(B) Inapplicable Where Catch-all Provisions Dispose of All Property. Husband purchased a single premium deferred annuity policy during marriage identifying himself as annuitant and owner and designating his wife as the beneficiary. Subsequently, they jointly prepared a pre-printed “fill-in-the-blanks” *pro per* petition and did not explicitly mention the annuity, but affirmatively checked boxes stating that each “of the parties shall retain any and all personal property in their respective possessions and/or control”, and that the “parties shall retain as their own, any and all pensions and/or retirement benefits pursuant to their employment which are due and/or become due.” A default decree of dissolution based upon the agreed petition was entered. After husband’s subsequent death, wife was not entitled to any portion of the annuity pursuant to the omitted property provisions of A.R.S. §25-318(B) because the form catch-all clauses awarded this property to husband and he had “possession and control” of the annuity. Similarly, although husband had not changed the beneficiary designation from wife prior to his death, A.R.S. §14-2804 automatically revoked the beneficiary designation to wife upon entry of the dissolution decree, and wife’s argument that husband intended to retain her as beneficiary was ineffectual because: “If a divorced spouse wishes to redesignate the former spouse as the beneficiary post-dissolution, such designation must be in writing and must otherwise comply with applicable policy terms.” *Lamparella v. Lamparella*, ___ Ariz. Adv. Rep. ___, ___ Ariz. ___, 109 P.3d 959 (CA1, 3/29/05) (“We hold A.R.S. §25-318(B) does not apply when a decree effectuates an explicit property settlement agreement that disposes of all the parties’ marital assets. We also hold the automatic revocation mandated by A.R.S. §14-2804 can not be avoided by spousal inaction.”)

VII. Debt

VIII. Attorney’s Fees

- A. Support Judgment Includes Attorney’s Fees. A person’s “obligation to pay support pursuant to a judgment cannot be terminated when that judgment includes unpaid costs and attorney’s fees associated with that support.” *Alley v. Stevens*, 443 Ariz. Adv. Rep. 19, 209 Ariz. 426, 104 P.3d 157 (CA1, 1/11/05) (“Section 25-621(21) (2000), A.R.S. defines a support order as including a judgment or order for attorney’s fees and costs. Moreover, A.R.S. §25-503(I) (2003) provides that ‘[n]otwithstanding any other law, formal written judgments for support and for associated costs and attorney fees are . . . enforceable until paid in full.’”)

IX. Paternity